Rama Road. Both these premises are on one piece of land purchased by the plaintiffs in 1961. In February 1964 the plaintiffs through their solicitors served a notice to quit on the defendant by A.R. registered post (Exhibit P.1.). The reason given in the notice is that the plaintiffs wanted vacant possession of the premises occupied by the defendant for the purpose of carrying on their business. The defendant, however, refused to give up possession of the premises.

At the hearing in the magistrate's court both parties agreed that there was only one issue to be determined by the learned magistrate and this was whether greater hardship would be caused by granting an order or judgment than by refusing it under section 12(1)(f) of the Control of Rent Ordinance 1956. The said provision reads as follows:—

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..

(f) where the owner of the premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and —

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by the purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question of whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

.. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. .. ..".

In this case it is obvious that the plaintiffs reasonably require the premises for the purpose of demolishing it and building in its place a new vehicle storage building for increased storage facilities in connection with their motor vehicles business as supported by exhibit P.2C.

The notice to quit (P.1) in this case was for more than the period of one year. The learned magistrate, however, stated that this notice is invalid because the notice was for premises No. 14, Pengkalan Rama Road, Malacca, whereas the premises in question is No. 14-A, Pengkalan Rama Road, Malacca. In *Re Cox & Ors.*[1] the notice specified "The Waterman's Arms" instead of "The Bricklayer's Arms", yet it was held that the notice was good notice inspite of the error because there was only one house held by the tenant under the landlord and the notice could not therefore have misled him. Similarly, in the present case the defendant holds only one house under the plaintiffs and he therefore could not have been misled by the mistake in the address given in the notice. I therefore find that the learned magistrate was wrong in law in stating that the notice to quit was invalid.

The next point to be considered is whether other accommodation is available for the owner or the tenant. On this matter it appears that the plaintiffs already have one vehicle storage building and that they are using it but they want to put up an additional vehicle storage building at the site of the premises in question for additional storage facilities. The onus of proving that other accommodation is available for the tenant is upon the landlord as stated in *Perak Hauliers Ltd.* v. *The Cycle & Carriage Co. Ltd.*[2] From the evidence adduced at the hearing the learned magistrate found that the plaintiffs failed to discharge this burden and I wholly agree with the finding of the learned magistrate.

Lastly, the defendant and her family have been occupying the said premises for domestic purposes for the last 40 years and they have no other accommodation. On the other hand, the plaintiffs want the premises merely to demolish it and build an additional vehicle storage building. The plaintiffs can still carry on their business without recovering possession of the premises in question as they already have one existing vehicle storage building (Exhibit P.2C). I therefore find that the learned magistrate was right in coming to the conclusion that the defendant had discharged the burden that greater hardship would be caused by granting the order than by refusing it.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

Solicitors: *D.A. Devadason; Murphy & Dunbar.*

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## NADARAJAH v. PUBLIC PROSECUTOR

**[A.Cr.J. (Yong J.) December 16, 1968]**
**[K.L. — Criminal Appeal No. 19 of 1968]**

*Criminal Law and Procedure — Trial — Quantum of proof required of accused person to rebut prosecution case — Misdirection.*

In this case the president of the sessions court had convicted the appellant on a charge of robbery under section 392 of the Penal Code. In his grounds of judgment the learned president said that the defence given by the appellant was unconvincing and that in the circumstances he was inclined to believe the case for the prosecution and he accordingly found the appellant guilty of the charge.

**Held,** allowing the appeal: the learned president after holding that the appellant had not convinced him of the truth of his explanation, had failed to consider whether it might reasonably be true and probable, although not convinced of its truth. It was impossible to say with certainty that he would have convicted the appellant if he had not misdirected himself on the

quantum of proof required of an accused person to rebut a prosecution case.

*Cases referred to:—*

(1) *R.* v. *Schama & Abramovitch* (1914), 11 Cr.App. Rep. 45, 49.

(2) *Loh Chak Wan* v. *Public Prosecutor* [1939] M.L.J. 84; [1937] F.M.S.L.R. 68, 70.

(3) *Murugiah* v. *Public Prosecutor* [1941] M.L.J. 17, 18.

(4) *Osman Khan* v. *R.* [1948] M.L.J. 56, 57.

(5) *Rajoo* v. *R.* [1949] M.L.J. 250, 251.

MAGISTRATE'S CRIMINAL APPEAL.

*D.P. Xavier* for the appellant.

*Mohamed Nizar bin Idrus* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Yong J.:** This is an appeal by Nadarajah against his conviction and sentence of 3 years imprisonment under sections 392 and 34 of the Penal Code for robbery. In the trial court below he was jointly charged with two others, but here we are concerned only with his appeal.

It is the prosecution case that the appellant stopped Subramaniam's motor car at the 2nd milestone of the Subang New Village — Klang Road and obtained a free lift to Klang. It was alleged that when he was inside the car, he attemped to take away the switch key and when Subramaniam resisted, a struggle followed, in which the appellant joined by two others robbed Subramaniam of his wallet containing $300. All the three then drove away in the car.

In his defence the appellant denied robbery and alleged that he had called at Subramaniam's shop in Subang New Village. There Subramaniam agreed to convey him in his pirate-taxi car to Port Swettenham at a fare of $8. He alleged that when nearing the 2nd milestone, Subramaniam told him that the fare of $8 was only for the journey to Klang and that to Port Swettenham it would be $12. When appellant refused to agree Subramaniam stopped his car and requested him to pay $3 for the journey up to that point. The appellant alighted from the car without paying the $3. Subramaniam pulled him by the shirt and a fight ensued, in which Subramaniam who got the worse of the exchanges ran away.

The car without the switch key was later found by the police near the place of the alleged robbery.

The appellant has submitted a number of grounds of appeal, the important gist of which as outlined by his counsel was that the learned president in convicting the appellant had erred in law in requiring the appellant,

(a) to convince him of the truth of his defence

(b) and to prove his allegations.

The learned president in his grounds of judgment said that the defence given by the appellant was unconvincing and that his allegations of hiring the car at $8 and of having a fight over the fare were not proved, and that under the circumstances he was inclined to believe the case for the prosecution and he accordingly found the appellant guilty of the charge.

The learned deputy public prosecutor urged me with great persuasion to hold that, on the evidence the conviction against the appellant was correct and that the learned president had erred only in the wrong choice of words to support his judgment. I agree that accidental use or omission of a word or words may or may not amount to a misdirection depending on the circumstances of the case. But where the trial court was clearly using the words to express its intention such use could not have been accidental.

The legal question which this court has now to decide is whether such words as used by the learned president amounted to a misdirection on the quantum of proof required of an accused person to rebut a prosecution case.

In *R.* v. *Schama & Abramovitch* [1] the Court of Criminal Appeal, comprising such eminent judges as Lord Reading C.J., Bray J., Avory J., Lush J., and Atkin J. re-stated certain principles of the criminal law as follows:—

> "Where the prisoner is charged with receiving recently stolen property and the prosecution has proved the possession by the prisoner, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the prosecution has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law; the court is not pronouncing new law but is merely re-stating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases."

These principles were followed and applied by Sir Samuel Thomas C.J. in a customs case of *Loh Chak Wan* v. *Public Prosecutor*,[2] and by Horne J. in a theft case of *Murugiah* v. *Public Prosecutor* [3] where he stated that:—

> "It is not necessary for him (accused) to convince the magistrate of the truth of his explanation; it is sufficient if the explanation may reasonably be true even if the magistrate is not convinced of its truth."

Then again in *Osman Khan* v. *Public Prosecutor* [4] where Russell J. said:—

> "He (the district judge) seems to have been of the opinion that the same degree of proof rests upon the accused to prove his story as rested upon the prosecution, whereas when an explanation is given by an accused which is consistent with innocence, the court must consider whether it might reasonably be true although not convinced of its truth."

These principles, followed by the Malayan Courts for more than a quarter of a century were again re-affirmed in 1949 by the Court of Criminal Appeal comprising such experienced judges as Murray-Aynsley C.J., Evans J. and Brown J. in a theft case in *Rajoo* v. *R.*[5] as follows:—

"We say that this direction (of the trial judge) was inadequate because it failed to explain to the jury that if they thought that the appellant had given an explanation which might reasonably be true, even though they were not convinced of its truth, that would mean that the prosecution had, upon the whole of the case, left them in a state of doubt, and so had failed to discharge their burden of proving the accused's guilt."

In the instant case the learned president after holding that the appellant had not convinced him of the truth of his explanation, had failed to further consider whether it might reasonably be true and probable, although not convinced of its truth. It is impossible to say with certainty that he would have convicted the appellant if he had not misdirected himself on the quantum of proof required of an accused person to rebut a prosecution case.

Under the circumstances the appeal is allowed and the conviction and sentence quashed.

*Appeal allowed.*

Solicitors: *Xavier & Thambiah.*

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## TENGKU MARIAM BINTE TENGKU SRI WA RAJA & ANOR. v. COMMISSIONER FOR RELIGIOUS AFFAIRS, TRENGGANU & ORS.

[O.C.J. (Wan Suleiman J.) December 29, 1968]
[Kuala Trengganu — Civil Suit No. 11 of 1967]

*Muslim Law — Wakaf — Wakaf for benefit of family with ultimate gift to charity — Gifts to charity illusory — Power of revocation reserved by donor — Effect of fetua by Mufti — Administration of Islamic Laws Enactment, 1955, Trengganu, ss. 4, 20(1) and 52(4).*

In this case the plaintiffs claimed a declaration *inter alia*, *wakaf* made by one Tengku Chik bin Abdul Rahim is void and of no effect. Under the terms of the *wakaf* property was settled on the family and relatives of the donor with an ultimate gift for religious purposes. The *wakaf* also provided for a few immediate gifts for charity. It was alleged that the donor of the *wakaf* also reserved a power to revoke the *wakaf*.

**Held:** the *wakaf* was invalid as (a) it was in effect a perpetual family settlement and that the immediate gifts to charity and the ultimate gift to charity were illusory, and (b) the reservation by the donor of a power of revocation was inconsistent with the fundamental idea underlying a *wakaf*.

**Semble:** Muslim law is the law of the land and it is the duty of the court to propound this law. A *fetua* by the *Mufti* cannot bind the court and the court retains unfettered discretion as to how much of such *fetua* it should accept and the court may decline to be bound by it.

*Cases referred to:—*

(1) *Guaranty Trust Company of New York* v. *Hannay & Company* [1915] 2 K.B. 536.

(2) *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, 41.

(3) *Ramah binti Ta'at* v. *Laton binti Malim Sutan* (1927), 6 F.M.S.L.R. 128.

(4) *Patimah binti Harris* v. *Haji Ismail bin Tasmin* [1939] M.L.J. 134.

(5) *Abul Fata Mohamed Ishak* v. *Rasamaya Dhur Chowdhri* (1894), L.R. 22 I.A. 76; I.L.R. 22 Cal. 619, P.C.

(6) *Fatuma binti Mohamed bin Salim Bakhshuwen & Anor.* v. *Mohamed bin Salim Bakhshuwen* [1952] A.C. 1.

(7) *Mahomed Ahsanulla Chowdrhy* v. *Amarchand Kundu & Ors.* I.L.R. 17 Cal. 498.

(8) *Abdul Satar & Ors.* v. *Advocate-General of Bombay* A.I.R. 1933 Bom. 87.

CIVIL SUIT.

*M. Sivalingam* for the plaintiff.

*Abu Talib bin Othman* (State Legal Adviser, Trengganu) for the 1st defendant.

*H.L. Wrigglesworth* (*Eugene Phoa* with him) for the 2nd defendant.

*Balendram s/o Vallipuram* for the 3rd defendant.

*Dato' David Marshall* for the 4th defendant.

*Cur. Adv. Vult.*

**Wan Suleiman J.:** The agreed facts (see agreed bundle pages 37 to 40) in this action are as follows:—

"1. Tengku Chik bin Abdul Rahim (hereinafter referred to as 'Tengku Chik') a Muslim resident in Trengganu was on the 13th day of August 1940 declared to be entitled to a 3/8ths. share free from encumbrances in a large tract of land in the District of Kemaman in the State of Trengganu (hereinafter referred to as 'the Chenderong Concession') by order of the High Court in Kuala Trengganu.

2. (a) On the 22nd day of February, 1941, Tengku Chik made a document purporting to be a *wakaf* (hereinafter referred to as "the said *wakaf*").

(b) The original of the said *wakaf* is in Jawi exhibited at pages 1 and 2 of the agreed bundle with Rumi transliteration at pages 3-6 and English translation at pages 7-10 of the agreed bundle.

(c) The said *wakaf* was registered in the office of the Commissioner for Religious Affairs, Trengganu, as No. 220 in the registration book at pages 68 and 69 thereof.

(d) The said *wakaf* is the *wakaf* referred to *inter alia* in paragraphs 4 and 7 of the statement of claim and paragraphs 3, 5, 7 and 8 of the defence.

3. Tengku Chik died on the 20th June 1956.

4. Tengku Chik left him surviving the following next of kin:—

(1) Che Mek binti Haji Mohamed, the third defendant herein, and

(2) Tengku Seri Wa Raja, his cousin.

5. Che Mek the third defendant was granted and extracted letters of administration to the estate of Tengku Chik by the High Court in Kuala Trengganu.

6. Tengku Seri Wa Raja is the father of the infant plaintiffs.